Irwanbudiana bin Amsah (suing as the administrator of the estate of Child M, deceased) v The Government of Malaysia

HIGH COURT (KOTA KINABALU) — SUIT NO TWU-21NCvC-2/12 OF 2019
LEONARD SHIM J
4 NOVEMBER 2022

Damages — Assessment — Medical negligence — Plaintiff as father and administrator of estate of deceased claimed against defendant for medical negligence — Defendant admitted liability — Quantum of damages to be awarded

The plaintiff was the father and administrator of Child M ('the deceased'). On 24 July 2015, the deceased's mother ('PW2') who was then at 39 weeks of gestation, was admitted to the hospital. An artificial rupture of membranes was undertaken on the same day and soon thereafter, the foetus was noted to have suffered bradycardia (slowing of the heartbeat) in utero. A decision was made to undertake an emergency lower segment caesarean section ('ELSCS'). Following the ELSCS, the deceased was delivered in an asphyxiated state the same day. The deceased suffered severe brain damage (cerebral palsy) after his delivery at the hospital which belonged to the first defendant. On 26 December 2019, the plaintiff filed this action as the father and litigation representative of the deceased against the defendants for alleged medical negligence resulting in severe brain damage suffered by the deceased. The deceased passed away at the age of five years and seven months and the plaintiff was now suing in his capacity as the administrator of the estate of the deceased. On the first day of trial, the defendant admitted liability to the plaintiff's claim and judgment on liability was duly recorded by the court against the first defendant and the claim against the second to eleventh defendants was withdrawn with no order as to costs. Thereafter, the trial proceeded on assessment of the quantum of damages against the first defendant only. The plaintiff claimed for general and special damages and costs and interests. Under general damages, the plaintiff claimed for pain and suffering and the loss of amenities of life and aggravated damages. Meanwhile, under special damages, the plaintiff claimed for: (a) travel expenses; (b) the cost of purchasing special food supplements; (c) the costs of massage therapy; (d) the cost of purchasing support equipment; (e) the cost of obtaining copies of the medical records; (f) the value of care provided to the deceased by caregivers and by his family members; (g) the cost of purchasing and renovating a new house to accommodate the deceased's needs; and (h) the cost of obtaining the grant of letters of administration in respect of the deceased's estate.

Held:

(1) The plaintiff had adduced cogent evidence to prove that the deceased had suffered considerable pain and suffering and loss of amenities until his untimely death. The defendant did not call any witness to prove otherwise. Hence, the plaintiff's claim under this head of general damages had been proven on a balance of probabilities. A sum of RM250,000 was appropriate and hence was awarded for pain, suffering and loss of amenities (see para 18).

(2) There were aggravating features that resulted in the plaintiff not receiving sufficient compensation from the basic damages for the injury suffered. The aggravating features such as the long delay of over two and a half years in admitting liability, refusal to make voluntary disclosure of medical records causing the cause of action for negligence to be concealed and the filing of this claim to be delayed by a few years and the way the defence was being pleaded and trial conducted was taken a serious view. A fair and reasonable award for aggravated damages would be RM300,000 (see paras 36–38).

(3) The claim for travel expenses was supported by oral and documentary evidence and covered travel expenses from July 2015 until February 2021 for a total of 67 months at the rate of RM1,000 per month. However, it was unclear from the evidence whether the Toyota Innova was mainly used to transport the deceased to the hospital or clinic or was it also used to transport the plaintiff's family members. It was also unclear who owned the Toyota Innova. Having regard to the lack of receipts and documentary evidence to fully support the pleaded sum of RM67,000, a sum of RM33,500 was reasonable and justifiable for travel expenses (see para 51).

(4) For special food supplements, some of the bills and receipts for such expenses may be found in the plaintiff's bundle of documents. PW2 was not challenged at all regarding this item of special damages. Her evidence therefore ought to be accepted as true. Hence, the pleaded sum of RM37,814.80 was allowed (see paras 53–54).

(5) PW2 had explained that she and her husband had sought private therapy for the deceased because: (i) the physiotherapy appointments at the hospital were only once a month; (ii) there were many other patients seeking such therapy as well; (iii) the waiting time was too long resulting in the deceased becoming irritable; and (iv) she and her husband therefore took the initiative of having the deceased undergo a stimulus massage therapy at a private centre. It was reasonable of the plaintiff to have sought private treatment. Thus, the pleaded sum of RM10,000 for cost of stimulus massage therapy was therefore allowed (see paras 61–62).

(6) The defendant did not call any witnesses and also did not challenge PW2 at all in cross-examination regarding the support equipment purchased

for the deceased. The claim for support equipment was supported by documentary and oral evidence which were undisputed and hence the pleaded sum of RM8,050 was allowed (see paras 67 & 70).

(7) The plaintiff's medico-legal advisors and experts would not have been able to give evidence or opinions on the merits of this action without first having to study copies of the medical records. Obtaining access to the records was a necessary step to take before bringing a claim in medical negligence. Although the plaintiff had yet to pay the proforma bill, the solicitor and client costs for the legal services rendered had been incurred and he would be liable to pay the legal fees for the application in the future. The pleaded sum of RM7,000 for pre-action discovery to obtain the deceased's medical records was allowed (see paras 79–81).

(8) The claim for cost/value of care had been proven by oral and documentary evidence. There was no evidence from the defendant to prove otherwise. The additional sum paid to the maid, Asnidar to look after the deceased was between RM400 to RM550 per month and after she left the plaintiff's employment, a new caregiver ('Joharia') was engaged to take care of the deceased. Joharia was paid approximately RM400 a month. Prior to the deceased's birth, the amount paid to Asnidar as the maid to serve the plaintiff's entire family household was approximately RM750 to RM900 per month. Therefore, the sum of RM2,000 per month claimed by the plaintiff for value of care given to the deceased alone was on the high side. A sum of RM500 per month would be fair and reasonable. A sum of RM33,500 (RM500 x 67 months) was awarded for the cost/value of care given to the deceased by his family members and other caregivers (see para 94).

(9) There was a lack of cogent evidence to show that the old house was inadequate and the deceased needed a bigger house or space to cater for or improve his health condition and needs. There was no medical evidence to show that the deceased needed a bigger room or space due to his health condition. Further, there was no evidence to show that the old house could not be renovated and the plaintiff must buy a new house and incur further costs of renovating the new house. Thus, it was unnecessary or unreasonable for the plaintiff to buy a new house costing RM330,000 and spend a further sum of RM150,000 for house renovation on account of the deceased's health condition and needs. The new renovated house was or would be used by the plaintiff's family. As the new house would appreciate in value over time, there was no evidence of loss to the plaintiff for buying the new house. The purchase price for the new house in the sum of RM330,000 was disallowed and the sum of RM49,250 that was used to renovate the deceased's room was allowed (see para 110).

(10) Obtaining the grant of letters of administration was a necessary expense in order to ensure that the plaintiff had the locus standi to file this claim

and later administer the monies from the damages to be awarded in this case. The pleaded sum of RM17,090.74 appeared to be excessive for obtaining letters of administration for an infant. An amount of RM5,000 would be fair and reasonable and thus was awarded to the plaintiff for obtaining the grant of letters of administration (see paras 113 & 115).

(11) Liability was admitted albeit on the first day of trial and the trial proceeded for two days for assessment of the quantum of damages. There was no complexity or novelty on the law and facts concerning the assessment of the quantum of damages. A global sum of RM70,000 for costs was fair and reasonable and thus awarded to the plaintiff (see para 117).

(12) For interest, it was awarded: (a) on general damages, at the rate of 5%pa from the date of service of the writ until the date of judgment on liability; (b) on special damages, at the rate of 4%pa from the date of the incident up to the date of judgment on liability; and (c) on the judgment sum including costs at the rate of 5%pa from the date of judgment on liability until the date of full and final settlement (see para 123).

[Bahasa Malaysia summary

Plaintif adalah bapa dan pentadbir Kanak-kanak M ('si mati'). Pada 24 Julai 2015, ibu si mati ('PW2') yang ketika itu dalam kandungan 39 minggu, telah dimasukkan ke hospital. Pemecahan ketuban dilakukan pada hari yang sama dan tidak lama selepas itu, janin dicatatkan mengalami bradikardia (degupan jantung yang perlahan) dalam rahim. Keputusan telah dibuat untuk menjalankan pembedahan kecemasan caesarean segmen bawah ('ELSCS'). Berikutan ELSCS, si mati dilahirkan dalam keadaan sesak nafas pada hari yang sama. Si mati mengalami kecederaan otak yang teruk (cerebral palsy) selepas bersalin di hospital milik defendan pertama. Pada 26 Disember 2019, plaintif memfailkan tindakan ini sebagai bapa dan wakil litigasi si mati terhadap defendan atas dakwaan kecuaian perubatan yang mengakibatkan kecederaan otak teruk dialami si mati. Si mati meninggal dunia pada usia lima tahun tujuh bulan dan plaintif kini menyaman atas kapasitinya sebagai pentadbir harta pusaka si mati. Pada hari pertama perbicaraan, defendan mengakui liabiliti terhadap tuntutan plaintif dan penghakiman ke atas liabiliti telah direkodkan dengan sewajarnya oleh mahkamah terhadap defendan pertama dan tuntutan terhadap defendan kedua hingga kesebelas telah ditarik balik tanpa perintah mengenai kos. Selepas itu, perbicaraan diteruskan pada penilaian kuantum ganti rugi terhadap defendan pertama sahaja. Plaintif menuntut ganti rugi am dan khas serta kos dan faedah. Di bawah ganti rugi am, plaintif menuntut kesakitan dan penderitaan serta kehilangan keselesaan hidup dan ganti rugi teruk. Sementara itu, di bawah ganti rugi khas, plaintif menuntut: (a) perbelanjaan perjalanan; (b) kos pembelian makanan tambahan khas; (c) kos terapi urutan; (d) kos pembelian peralatan sokongan; (e) kos untuk mendapatkan salinan rekod perubatan; (f) nilai penjagaan yang diberikan

kepada si mati oleh penjaga dan oleh ahli keluarganya; (g) kos pembelian dan pengubahsuaian rumah baharu untuk menampung keperluan si mati; dan (h) kos untuk mendapatkan geran surat pentadbiran berkenaan dengan harta pusaka si mati.

Diputuskan:

(1) Plaintif telah mengemukakan keterangan yang kukuh untuk membuktikan bahawa si mati telah mengalami kesakitan dan penderitaan yang besar dan kehilangan keselesaan sehingga kematiannya. Defendan tidak memanggil mana-mana saksi untuk membuktikan sebaliknya. Oleh itu, tuntutan plaintif di bawah bahagian ganti rugi am ini telah dibuktikan atas imbangan kebarangkalian. Sejumlah RM250,000 adalah sesuai dan oleh itu dianugerahkan untuk kesakitan, penderitaan dan kehilangan keselesaan (lihat perenggan 18).

(2) Terdapat ciri-ciri teruk yang menyebabkan plaintif tidak menerima pampasan yang mencukupi daripada ganti rugi asas untuk kecederaan yang dialami. Ciri-ciri teruk seperti kelewatan yang panjang selama lebih dua setengah tahun dalam akuan liabiliti, keengganan untuk membuat pendedahan sukarela rekod perubatan menyebabkan kausa tindakan kecuaian disembunyikan dan pemfailan tuntutan ini ditangguhkan selama beberapa tahun dan cara pembelaan diplid dan perbicaraan dijalankan telah dipandang serius. Award yang adil dan munasabah untuk ganti rugi teruk adalah RM300,000 (lihat perenggan 36–38).

(3) Tuntutan untuk perbelanjaan perjalanan disokong oleh keterangan lisan dan dokumen serta perbelanjaan perjalanan dari Julai 2015 hingga Februari 2021 selama 67 bulan pada kadar RM1,000 sebulan. Walau bagaimanapun, tidak jelas daripada keterangan sama ada Toyota Innova digunakan terutamanya untuk membawa si mati ke hospital atau klinik atau ia juga digunakan untuk membawa ahli keluarga plaintif. Ia juga tidak jelas siapa pemilik Toyota Innova itu. Dengan mengambil kira kekurangan resit dan keterangan dokumen untuk menyokong penuh jumlah yang diplid sebanyak RM67,000, sejumlah RM33,500 adalah munasabah dan wajar untuk perbelanjaan perjalanan (lihat perenggan 51).

(4) Bagi makanan tambahan khas, beberapa bil dan resit untuk perbelanjaan tersebut boleh didapati dalam ikatan dokumen plaintif. PW2 tidak dicabar sama sekali mengenai item ganti rugi khas ini. Oleh itu keterangannya harus diterima sebagai benar. Oleh itu, jumlah yang diplid sebanyak RM37,814.80 adalah dibenarkan (lihat perenggan 53–54).

(5) PW2 telah menjelaskan bahawa dia dan suaminya telah mendapatkan terapi persendirian untuk si mati kerana: (a) temujanji fisioterapi di

hospital hanya sebulan sekali; (b) terdapat ramai pesakit lain yang mendapatkan terapi sedemikian juga; (c) masa menunggu terlalu lama menyebabkan si mati menjadi cepat marah; dan (d) dia dan suaminya mengambil inisiatif untuk si mati menjalani terapi urutan rangsangan di sebuah pusat swasta. Adalah munasabah bagi plaintif untuk mendapatkan rawatan peribadi. Oleh itu, jumlah yang diplid sebanyak RM10,000 untuk kos terapi urutan rangsangan adalah dibenarkan (lihat perenggan 61–62).

(6) Defendan tidak memanggil mana-mana saksi dan juga tidak mencabar langsung PW2 dalam soal balas berhubung peralatan sokongan yang dibeli untuk si mati. Tuntutan untuk peralatan sokongan disokong oleh keterangan dokumentari dan lisan yang tidak dipertikaikan dan oleh itu jumlah yang diplid sebanyak RM8,050 adalah dibenarkan (lihat perenggan 67 & 70).

(7) Penasihat dan pakar *medico-legal* plaintif tidak akan dapat memberikan keterangan atau pendapat tentang merit tindakan ini tanpa perlu mengkaji salinan rekod perubatan terlebih dahulu. Mendapatkan akses kepada rekod adalah satu langkah yang perlu diambil sebelum membuat tuntutan dalam kecuaian perubatan. Walaupun plaintif masih belum membayar bil proforma, peguam dan kos klien untuk perkhidmatan guaman yang diberikan telah ditanggung dan dia akan bertanggungjawab untuk membayar yuran guaman untuk permohonan itu pada masa hadapan. Jumlah yang diplid sebanyak RM7,000 untuk penemuan sebelum tindakan bagi mendapatkan rekod perubatan si mati adalah dibenarkan (lihat perenggan 79–81).

(8) Tuntutan untuk kos/nilai penjagaan telah dibuktikan dengan keterangan lisan dan dokumentari. Tiada keterangan daripada defendan untuk membuktikan sebaliknya. Jumlah tambahan yang dibayar kepada pembantu rumah, Asnidar untuk menjaga si mati adalah antara RM400 hingga RM550 sebulan dan selepas dia meninggalkan pekerjaan bersama plaintif, seorang penjaga baharu ('Joharia') telah terlibat untuk menjaga si mati. Joharia dibayar lebih kurang RM400 sebulan. Sebelum kelahiran si mati, jumlah yang dibayar kepada Asnidar sebagai pembantu rumah untuk berkhidmat kepada seluruh isi rumah plaintif adalah kira-kira RM750 hingga RM900 sebulan. Oleh itu, jumlah RM2,000 sebulan yang dituntut oleh plaintif untuk nilai penjagaan yang diberikan kepada si mati sahaja adalah pada tahap yang tinggi. Jumlah RM500 sebulan adalah adil dan munasabah. Sejumlah RM33,500 (RM500 x 67 bulan) telah diberikan untuk kos/nilai penjagaan yang diberikan kepada si mati oleh ahli keluarganya dan penjaga lain (lihat perenggan 94).

(9) Terdapat kekurangan keterangan kukuh untuk menunjukkan bahawa rumah lama itu tidak mencukupi dan si mati memerlukan rumah atau ruang yang lebih besar untuk menampung atau memperbaiki keadaan

dan keperluan kesihatannya. Tiada keterangan perubatan menunjukkan si mati memerlukan bilik atau ruang yang lebih besar kerana keadaan kesihatannya. Tambahan pula, tiada keterangan menunjukkan rumah lama itu tidak boleh diubah suai dan plaintif mesti membeli rumah baharu dan menanggung kos lanjut untuk mengubah suai rumah baharu itu. Oleh itu, adalah tidak perlu atau tidak munasabah untuk plaintif membeli rumah baru berharga RM330,000 dan membelanjakan sejumlah RM150,000 lagi untuk pengubahsuaian rumah atas sebab keadaan kesihatan dan keperluan si mati. Rumah baru yang telah diubah suai itu telah atau akan digunakan oleh keluarga plaintif. Memandangkan rumah baharu itu akan meningkat nilainya dari semasa ke semasa, tiada keterangan kerugian kepada plaintif kerana membeli rumah baharu itu. Harga belian rumah baharu itu berjumlah RM330,000 tidak dibenarkan dan RM49,250 yang digunakan untuk mengubah suai bilik si mati adalah dibenarkan (lihat perenggan 110).

(10) Mendapatkan geran surat pentadbiran adalah perbelanjaan yang perlu untuk memastikan bahawa plaintif mempunyai locus standi untuk memfailkan tuntutan ini dan kemudiannya mentadbir wang daripada ganti rugi yang akan diawardkan dalam kes ini. Jumlah yang didakwa sebanyak RM17,090.74 adalah berlebihan untuk mendapatkan surat pentadbiran untuk bayi. Jumlah RM5,000 adalah adil dan munasabah dan dengan itu telah dianugerahkan kepada plaintif untuk mendapatkan geran surat pentadbiran (lihat perenggan 113 & 115).

(11) Liabiliti telah diakui walaupun pada hari pertama perbicaraan dan perbicaraan diteruskan selama dua hari untuk penilaian kuantum ganti rugi. Tiada kerumitan atau kebaharuan pada undang-undang dan fakta mengenai penilaian kuantum ganti rugi. Jumlah global RM70,000 untuk kos adalah adil dan munasabah dan dengan itu diberikan kepada plaintif (lihat perenggan 117).

(12) Bagi faedah, adalah diawardkan: (a) atas ganti rugi am, pada kadar 5% setahun dari tarikh penyampaian writ sehingga tarikh penghakiman atas liabiliti; (b) atas ganti rugi khas, pada kadar 4% setahun dari tarikh kejadian sehingga tarikh penghakiman atas liabiliti; dan (c) atas jumlah penghakiman termasuk kos pada kadar 5% setahun dari tarikh penghakiman ke atas liabiliti sehingga tarikh penyelesaian penuh dan muktamad (lihat perenggan 123).]

Cases referred to

Ahmad Radhiq Arbee bin Ahmad Rejal Arbee (as a husband and dependant of Sharifah Shalihah bt Sayed Abdullah, deceased) & Ors v Kerajaan Malaysia & Ors [2020] 10 MLJ 459, HC (refd)

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors [1995] 2 MLJ 770, CA (refd)

Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan [2001] 6 MLJ 497, HC (refd)
Browne v Dunn [1894] 6 R 67, HL (refd)
Chai Yee Chong v Lew Thai [2004] 2 MLJ 465, CA (refd)
Dato' Stanley Isaacs (suing by himself and as the administrator of the estate of To' Puan Suzanne Thomas, deceased) v The Government of Malaysia & Ors [2019] 8 MLJ 331, HC (refd)
Devarani a/p Vijiyan v Dr Daniel Foo Yong Chiang dan satu lagi [2017] MLJU 2444, HC (refd)
Dr Fatin Ahya Zulkeflee & 26 Ors v Muhammad Fikrey bin Bakhtiar & Ors Civil Appeal No W01(NCVC)(W)-230–05 of 2019) (unreported), CA (refd)
Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal [2018] 3 MLJ 281, FC (refd)
Farah Ahmed Naji Al-Sahhaf v Dr Lee Weng Seng & Anors [2017] MLJU 1725, HC (refd)
Harraz bin Abdul Halim & Anor v Dr Azlina Abdul Aziz & Ors [2018] 1 LNS 1387, HC (refd)
Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors [2016] 2 MLJ 1, FC (refd)
Jaafar Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693, FC (refd)
Kasirin bin Kasmani v The Official Administration & Anor [1991] MLJU 22; [1991] 2 CLJ Rep 800, HC (refd)
Kerajaan Malaysia v Azim Muzammil (unreported) (refd)
Lau Kung Kai v Abu Serah bin Bol (M) [2008] MLJU 352; [2008] 10 CLJ 245, HC (refd)
Lee Xien Cheh v Kerajaan Malaysia (unreported) (refd)
Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor [2016] 4 MLJ 282, FC (refd)
Morton-Norwich Products Inc v Intercen Ltd (No 2) [1981] FSR 337 (refd)
Muhammad Zulkarnain bin Mohamed Rokani (a child suing through his representative, Mohamed Rokani bin Mokmin) & Ors v Pengarah Hospital Sultan Ismail Johor Bahru & Ors [2021] 8 MLJ 762, HC (refd)
Norfatehah Alias v The Government of Malaysia & Ors & Anor (Civil Suit No 21NCVC-21–08 of 2017) (unreported), HC (refd)
Norwich Pharmacal Co and others v Commissioners of Customs and Excise [1972] 3 All ER 813, CA (refd)
Nur Syarafina bt Sa'ari v Kerajaan Malaysia & Ors [2019] 12 MLJ 741; [2019] 9 CLJ 247, HC (refd)
Nur Syasya Syaurah bt Tahir v the Government of Malaysia & Anor [2018] MLJU 2143, HC (refd)
Nurul Husna Muhammad Hafiz & Anor v Kerajaan Malaysia & Ors [2014] MLJU 1922; [2015] 1 CLJ 825, HC (refd)
Pantai Medical Centre Sdn Bhd v Fareed Reezal bin Arund (suing through his wife

and litigation representative Wan Zafura bt Wan Kassim) and another appeal [2022] 4 MLJ 529, CA (refd)
Pyu Pyu Ma v Dr Lim Soo How & Ors [2019] 11 MLJ 628, HC (refd)
Rohgetana Mayathevan v Dr Navin Kumar & Ors and other appeals [2017] 4 MLJ 102, CA (refd)
Rokiah Sabeh v Dr Ch'ng Beng Keat & Anor (Summons No 22NCVC-72 of 2011) (unreported), HC (refd)
Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784, CA (refd)
Siti Zalwani bt Mohd Zaid v Medi-Circle Sdn Bhd & Anor (Suit No WA-22NCVC-611–09 of 2018) (unreported), HC (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)
Sugunah d/o Sinnappa vs Dr Abdul Gafoor bin Abdul Mubarak and 8 Ors (Civil Suit No 21NCVC-25–10 of 2015) (unreported), HC (refd)
Tan Cheong Poh & Anor v Teoh Ah Keow [1995] 3 MLJ 89, CA (refd)
Tan Jamie v Hasnah Salim & Ors (Civil Appeal No TA-21NCVC-19–11 of 2014) (unreported), CA (refd)
Thompson v Commissioner of Police [1997] 2 All ER 762, CA (refd)
Vincent Manickam s/o David and Ors v Dr S Hari Rajah & Anor [2018] 2 MLJ 497, HC (refd)
Yap Sao Leong & Anor (both suing as administrators to the estate of Yap Yi Hong, deceased) v Kerajaan Malaysia & Ors [2021] MLJU 86; [2021] 1 LNS 33, HC (refd)

Legislation referred to

Civil Law Act 1956 s 11
Rules of Court 2012 O 42 r 12, Form 117

Baldev Singh (with Kelvin Wong) (Baldev Gan & Assoc) for the plaintiff.
Mohd Hafizi bin Abdul Halim (with Fazriel Fardiansyah bin Abdul Kadir) (Attorney General's Chambers) for the defendant.

Leonard Shim J:

INTRODUCTION

[1] The plaintiff is the father and administrator of the late Child M, deceased. On 24 July 2015 at about 2.30am, Puan Nurhayaty bt Mohd Jufri who was then at 39 weeks of gestation, was admitted to Hospital Tawau. An artificial rupture of membranes was undertaken on the same day and soon thereafter, the fetus was noted to have suffered bradycardia (slowing of the heart beat) in utero. A decision was made to undertake an emergency lower segment Caesarean section ('ELSCS') was made. Following the ELSCS, Child M was delivered in an asphyxiated state at about 4.29pm the same day. Child

M suffered severe brain damage (cerebral palsy) after his delivery at Hospital Tawau which belongs to the first defendant. A

[2] On 26 December 2019, plaintiff filed this action as father and litigation representative of Child M against the defendants for alleged medical negligence resulting in severe brain damage suffered by Child M. The defendants filed a joint defence and denied liability and puts the plaintiff to strict proof. On 19 December 2021, Child M passed away at the age of five years and seven months and his father is now suing in his capacity as administrator of the estate of Child M, deceased. B C

[3] The trial proceeded from 20, 22 and 23 June 2022. On the first day of trial, the first defendant admitted liability to the plaintiff's claim and judgment on liability was duly recorded by the court against the first defendant and the claim against the second to 11th defendants was withdrawn with no order as to costs. Thereafter, the trial proceeded on assessment of the quantum of damages on 22 to 23 June 2022 against the first defendant only. D

[4] The plaintiff called two witnesses to give evidence on behalf of the plaintiff, namely: E

(a) PW1 — Dr Milton Lum Siew Fah — consultant obstetrician and gynecologist as expert witness; and

(b) PW2 — Puan Nurhayaty bt Mohd Jufri who is the mother of the deceased. F

[5] The defendants elected not to call any witness for the defence.

[6] In determining the amount of damages, the learned SFC drew the court's attention to the case of *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784 (Court of Appeal) which in para 14 states as follows: G

> [14] It is trite that a person injured by another's wrong is entitled to general damages for non-pecuniary such as his pain and suffering, hardship, discomfort, mental distress or loss of amenities of life. There is no standard rule to measure the damage in such cases. The courts usually determine the amount based on a fair and reasonable standards, free from fanciful standards based upon evidence adduced. The court should also consider the age, health condition of the injured party pre-injury as compared with his condition after the injury. The court also consider the need for medical, psychological or physical symptoms and the impact on the plaintiff's conduct and lifestyle before apportioning the amount of damages. H I

AGREED ITEMS OF SPECIAL AND GENERAL DAMAGES

[7] The parties have agreed to the following items of general and special damages:

Items — quantum:

(a) three items of special damages and one item of general damages have been agreed, namely:

(i) the hospital and medical expenses in the sum of RM1,147;

(ii) the cost of purchasing diapers, wipes, creams, suction tubes and personal care items in the sum of RM9,118.70;

(iii) the funeral expenses in the sum of RM1,000; and

(iv) statutory bereavement in the sum of RM30,000.

See: p 45 of the notes of proceedings.

(b) the court will now proceed to assess a total of 12 items of damages, costs and interest, namely:

Special Damages

(i) the travel expenses;

(ii) the cost of purchasing special food supplements

(iii) the cost of massage therapy;

(iv) the cost of purchasing support equipment;

(v) the cost of obtaining copies of the medical records;

(vi) the value of care provided to Child M by caregivers and by his family members;

(vii) the cost of purchasing and renovating a new house to accommodate Child M's needs;

(viii) the cost of obtaining the grant of letters of administration in respect of Child M's estate;

(c) General damages:

(i) for the pain and suffering and the loss of amenities of life; and

(ii) aggravated damages;

(d) Costs and interest:

(i) party and party costs; and

(ii) interest.

GENERAL DAMAGES FOR PAIN AND SUFFERING AND LOSS OF AMENITIES

[8] Child M was delivered on 24 July 2015 in an asphyxiated state (meaning, he had suffered a severe deprivation of oxygen). His Apgar scores (which are used to evaluate the health of a newborn after birth and in response to resuscitation) were noted to be poor, with scores of 2, 4 and 5 at 1, 5 and 10 minutes of life respectively.

Child M also suffered severe metabolic acidosis as a result of the birth asphyxia. See: para 19 at p 4 of Bundle MLS1 (encl 68) (Dr Milton Lum's expert report).

[9] He was then admitted into the Neonatal Intensive Care Unit ('NICU') and intubated. Child M remained in the NICU for 12 days following his birth, during which he suffered the following complications:

(a) nosocomial pneumonia;

(b) coagulopathy;

(c) fits;

(d) anaemia; and

(e) left blepharitis.

See: para 22 at p 4 of Bundle MLS1 (encl 68) ('Dr Milton Lum's expert report').

[10] Child M was discharged from the Hospital on 14 August 2015. He was later diagnosed with hypoxic ischaemic encephalopathy (Grade II).

[11] Child M's suffering unfortunately did not ease following his discharge from the hospital. He was later re-admitted to the hospital from 12 April to 15 April 2016 with a diagnosis of bronchopneumonia. Puan Nurhayaty ('PW2') had given unchallenged evidence that Child M often suffered from seizures, requiring emergency treatment; and that he also suffered complications with his Ryles' tube (which was inserted into his stomach through his nasal cavity so as to feed him) and required regular suctioning to remove phlegm.

See: Q&A 38 at pp 8–9 of the witness statement of Puan Nurhayaty bt Mohd Jufri.

[12] The plaintiff submits that the current trend of awards would guide the court in determining the quantum of damages for pain and suffering and loss of amenities. The award for victims of tort who had suffered brain damage in recent cases has been in the range of RM400,000 to RM450,000.

[13] In the following cases involving brain-damaged infants, the awards of general damages for pain and suffering and loss of amenities of life were as follows:

(a) in *Dr Fatin Ahya Zulkeflee & 26 Ors v Muhammad Fikrey bin Bakhtiar & Ors* (Court of Appeal Civil Appeal No W01(NCVC)(W)-230–05 of 2019) (unreported), the Court of Appeal had awarded the sum of RM450,000;

(b) in *Harraz bin Abdul Halim & Anor v Dr Azlina bt Abdul Aziz & 13 Ors* [2018] 1 LNS 1387, the Court of Appeal upheld the award in the sum of RM400,000; and

(c) in *Farah Ahmed Naji Al-Sahhaf v Dr Lee Weng Seng & Anors* [2017] MLJU 1725, the High Court awarded the sum of RM400,000.

[14] Unlike the plaintiffs in the cases mentioned above, Child M's period of pain and suffering and loss of amenities of life was shorter. However, he had suffered far worse in that period of five years and seven months.

[15] In the circumstances the plaintiff seeks the sum of RM300,000 as general damages for the pain and suffering and loss of amenities of life.

[16] The defendant contends that award for pain and suffering is an award that consider the past, present and future of the victim but it must be noted that damages for pain and sufferings are based on case by case basis. For our current case, after considering all the things which had happened, the defendant submits that the most suitable general damages that this court should award to the plaintiff is RM250,000.

[17] The defendant referred to the following cases in deciding the above amount:

(a) *Lee Xien Cheh v Kerajaan Malaysia* (unreported) — RM300,000;

(b) *Kerajaan Malaysia v Azim Muzammil* (unreported) — RM300,000; and

(c) *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1 — RM300,000.

[18] From the body of evidence before the court, the plaintiff has adduced cogent evidence to prove that Child M suffered considerable pain and suffering and loss of amenities until his untimely death. From the day of his birth until death, Child M's life was one of pain and suffering. His death may have spared him further years of suffering but that does not detract from the pain and

suffering which he had endured for five years and seven months. The defendant did not call any witness to prove otherwise. Hence, this court finds that the plaintiff's claim under this head of general damages has been proven on a balance of probabilities. However, the period of suffering by Child M was shorter due to his untimely death. In the circumstances of the present case, this court finds that a sum of RM250,000 is appropriate. Hence, a sum of RM250,000 is awarded for pain, suffering and loss of amenities.

AGGRAVATED DAMAGES

[19] The defendant referred to, inter alia, the case of *Thompson v Commissioner of Police* [1997] 2 All ER 762 where the court have decided on the principle of aggravated damages as follows:

(a) compensatory damages are made up of:

(i) basic damages ie degree of harm suffered by plaintiff; and

(ii) aggravated damages. They are not intended to punish the defendants.

(b) aggravated damages are awarded where there are aggravating features that result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to basic damages;

(c) the aggravating features include:

(i) humiliating circumstances;

(ii) conduct of defendants showing that they behaved in a high handed, malicious or oppressive manner;

(iii) the way the litigation or trial is conducted; and

(iv) when considering what are the appropriate damages the conduct caused or contributed to by the plaintiff must be taken into account.

[20] The learned SFC submitted that Hospital Tawau is a government owned and non-profit making hospital and the first defendant had not behaved in a high handed, malicious or oppressive manner. As such, the learned SFC urged the court not to award any aggravated damages in this case.

[21] Under this head of general damages, the plaintiff contends that the following aggravating factors would give rise to an award of aggravated damages:

(a) delay in admitting liability in this case;

A (b) refusal/obstructive conduct to make voluntary disclosure of the medical records of the deceased;

(c) unfair cross-examination of Puan Nurhayaty, PW2; and

(d) the defendants pleaded false matters in the joint defence.

B

[22] The plaintiff referred to the case of *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 MLJ 281 where a sum of RM1m was awarded as aggravated damages for medical negligence.The Federal Court held as follows at para 99:

C

> It can be seen from the above cases that aggravated damages can be and have been awarded as a separate head of damage in tort.

[23] In *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors* [2018] 1 MLJ 784, the Court of Appeal held as follows at para 32:

D

> Now, aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the Interest or personality of the plaintiff, and where this injury has been caused or exacerbated by the *exceptional conduct of the defendant.*

E

[24] In *Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor* [2016] 4 MLJ 282, the Federal Court held as follows at para 75:

> In appropriate cases, substantial damages may be awarded for any *indignity, discomfort or inconvenience* suffered, even aggravated damages may be awarded in light of the conduct of the tortfeasor.

F

[25] In *Dato' Stanley Isaacs v The Government of Malaysia & Ors* [2019] 8 MLJ 331, Aliza bt Sulaiman JC (as Her Ladyship then was) awarded the sum of RM500,000 as aggravated damages because of the conduct of the defendants. Amongst others, the defendants had pleaded and presented a false case. They had also altered the medical records so as to try to escape liability. Her Ladyship had said as follows to describe the defendants' conduct:

G

> This court takes a most serious view of the second defendant's words and conduct which are disturbing, appalling and an insult to his profession and to the plaintiff and his family ... There can be no clearer illustration of *insulting conduct which justifies an award for aggravated damages*... Such despicable conduct enhances the plaintiff's case for aggravated damages to be awarded.

H

I

[26] In *Yap Sao Leong & Anor (both suing as administrators to the estate of Yap Yi Hong, deceased) v Kerajaan Malaysia & Ors* [2021] MLJU 86; [2021] 1 LNS 33, See Mee Chun J (as Her Ladyship then was) had in a medical negligence case involving the Government awarded the sum of RM300,000 as aggravated damages. Amongst the factors taken into account in making such an award was

that there was a delayed admission of liability.

[27] In *Ahmad Radhiq Arbee bin Ahmad Rejal Arbee (as a husband and dependant of Sharifah Shalihah bt Sayed Abdullah, deceased) & Ors v Kerajaan Malaysia & Ors* [2020] 10 MLJ 459, the defendants had delayed in admitting liability, knowing full well that their negligence was indefensible. A sum of RM300,000 was awarded for aggravated damages. Gunalan Muniandy J (as His Lordship then was) held as follows:

> Aggravating features can also include the way the litigation and trial are conducted.
>
> [25] Among the chief reasons why the courts are inclined to award AD is when the defendants refuse to admit liability in clear cases as in this instance and instead file their defence and cause the matter to be set down for trial and protracted.
>
> [26] The plaintiff in paras 7.6, 7.7, 7.8 and 7.9 of their first submission submitted the following factors to support and establish their claim for AD;
>
> (a) the findings in the defendant's hospital internal inquiry report ie sub-paragraphs 6.2.1–6.3.2.5 which speaks for themselves;
>
> (b) the defendant's hospital failed to give a proper explanation with regards to the deceased's condition prior to and after her death; and
>
> (c) neither did the defendant contact the plaintiff to offer any explanation after the completion of their internal inquiry.

[28] In *Nur Syarafina bt Sa'ari v Kerajaan Malaysia & Ors* [2019] 12 MLJ 741; [2019] 9 CLJ 247, the case involves non-disclosure of the patient's medical records by the hospital. The High Court awarded a sum of RM200,000 as aggravated damages.

[29] In *Norfatehah Alias v The Government of Malaysia & Ors & Anor* (Alor Setar High Court Civil Suit No 21NCVC-21–08 of 2017) (unreported), Mr Justice Ghazali bin Cha, as His Lordship then was, awarded the total sum of RM450,000 as aggravated damages in two medical negligence claims that were heard together, one which involved a mother who had suffered gynaecological injuries, and the other her infant son who had suffered cerebral palsy at birth and had endured it for two years and seven months before he passed away.

[30] The plaintiff submits that it is trite law that patients have an innominate and qualified right of access to their medical records. In *Nurul Husna Muhammad Hafiz & Anor v Kerajaan Malaysia & Ors* [2014] MLJU 1922; [2015] 1 CLJ 825 Vazeer Alam JC (as His Lordship then was) had at para 21 stated as follows:

> The patient has an innominate and qualified right of access to his medical records and there is a corresponding general duty on the part of the physician or hospital to disclose the patient's medical records to the patient, his agents, medical advisers or legal advisers ...

[31] In *Siti Zalwani bt Mohd Zaid v Medi-Circle Sdn Bhd & Anor* (Kuala Lumpur Suit No WA-22NCVC-611–09 of 2018) (unreported), the High Court in awarding the sum of RM100,000 as aggravated damages took into account, amongst others, the distasteful and unfair questions put to the plaintiff in cross-examination. The High Court's decision on quantum is pending appeal to the Court of Appeal.

[32] In *Pantai Medical Centre Sdn Bhd v Fareed Reezal bin Arund (suing through his wife and litigation representative Wan Zafura bt Wan Kassim) and another appeal* [2022] 4 MLJ 529, the Court of Appeal had affirmed the High Court's decision to award damages for loss of income despite the defendant's contention that there were no documents showing the claimant's income. In the grounds of judgment the Court of Appeal had referred to a number of cases where damages for loss of earnings were awarded despite there being no documentary evidence of such loss. The Court of Appeal's decision in *Fareed Reezal* is currently pending appeal to the Federal Court but not on the issue of income.

[33] In *Dato' Stanley Isaacs (suing by himself and as the administrator of the estate of To' Puan Suzanne Thomas, deceased) v The Government of Malaysia & Ors* [2019] 8 MLJ 331, Aliza Sulaiman JC (as Her Ladyship then was) had accepted the oral evidence of the plaintiff's witnesses in awarding various items of damages such as travel expenses; value of care; loss of contribution; and the cost of obtaining letters of administration despite the absence of documentary evidence.

[34] The Court of Appeal in *Rohgetana Mayathevan v Dr Navin Kumar & Ors and other appeals* [2017] 4 MLJ 102 had held as follows as regards oral evidence in support of items of special damages:

> [16] In respect of Therapies (Spastic Centre) and Complimentary medicine (Ayurvedic), the defendants persisted before us that only such expenses incurred as could be supported by receipts (documentary proof) ought to be allowed. We however did not find that the learned judge had misdirected himself on the law when he held that special damages, so long as they were pleaded and particularised, could be proved by oral or documentary evidence (*ABDA Airfreight Sdn Bhd v Sistem Penerbangan Malaysia Bhd* [2001] 3 MLJ 641; [2001] 8 CLJ 1). Such claims *were to be allowed so long they were within a reasonable sum and justifiable in the circumstances.* Like the learned judge, we therefore did not find any reason to interfere with the award of the learned deputy registrar in respect of these two items.

[35] In the circumstances, the plaintiff seeks the sum of RM500,000 as aggravated damages in this case.

[36] It is common ground that aggravated damages are awarded where there are aggravating features that result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to basic damages. They are not intended to punish the defendant. See *Thompson v Commissioner of Police* above. Having carefully scrutinised the evidence before the court, this court finds that there are aggravating features that resulted in the plaintiff not receiving sufficient compensation from the basic damages for the injury suffered.

[37] Further, the court takes a serious view of the aggravating features such as the long delay of over two and a half years in admitting liability, refusal to make voluntary disclosure of medical records causing the cause of action for negligence to be concealed and the filing of this claim to be delayed by a few years and the way the defence is being pleaded and trial conducted. See *Yap Sao Leong*, *Nur Syarafina* and *Ahmad Radhiq Arbee* above. In *Thompson v Commissioner of Police*, the English Court of Appeal held:

> Aggravating features can also include the way the litigation and trial is conducted.

[38] The authorities cited by the parties above shows that the trend of awards for aggravated damages ranges between RM100,000 to RM1m depending on the circumstances of each case. Applying the principles and authorities aforesaid to the facts of the present case, a fair and reasonable award for aggravated damages would be RM300,000. See *Yap Sao Leong* and *Ahmad Radhiq Arbee* above.

SPECIAL DAMAGES

Travel expenses

[39] The plaintiff had pleaded the sum of RM67,000 (calculated at a rate of RM1,000 a month from July 2015 until February 2021 for a total of 67 months) under this head of damages. See: item 11.21 at p 8 of the bundle of pleadings (encl 54).

[40] Some documentary evidence of such expenses are found at pp 770–771 of the plaintiff's bundle of documents (Vol 2) (encl 58 — PBD 1).

[41] Puan Nurhayaty had given evidence in her witness statement regarding the travel expenses incurred by her and her husband, namely:

A (a) that she and her husband often had to bring Child M to seek emergency treatment at hospitals and clinics because he often suffered from seizures;

(b) that the frequency of Child M's visits varied depending on his condition
B (she had said that sometimes it could be once a month or once every three or four months);

(c) that in order to save time her husband would travel to the hospital first to obtain a waiting number and she would come later with Child M and the maid;
C

(d) that she and her husband often travelled to hospitals and clinics to replace the Ryles tubes and to purchase nebulisers;

(e) that Child M after obtaining his 'OKU' card also attended therapy sessions at 'Pusat Pemulihan Dalam Komuniti (PDK) Kem Kabota'
D twice a week (this began when Child M reached two years of age);

(f) that Child M also attended physiotherapy and occupational therapy sessions at the hospital once a month (Child M started undergoing such therapies since January 2016);
E

(g) that the hospital was approximately 20km from their home and that the 'PDK Kem Kabota' was approximately 15km from their home at the material time;

(h) that Child M also underwent stimulation and massage therapy 'bersama
F Pn Darmah (Tawau) ... dan bersama Mak Jah (Lahad Datu)'; and

(i) that she and her husband travelled regularly to purchase Child M's consumables; special foods and supplements; equipment; etc.

G See: Q&A 38, 41, 50, 53 and 102 at pp 8–9, 11–12, & 23 of the witness statement of Puan Nurhayaty bt Mohd Jufri.

[42] Puan Nurhayaty was not challenged at all regarding this item of special
H damages. Her evidence therefore ought to be accepted as true by this court. See: *Sivalingam* above.

[43] The plaintiff contends that for therapy sessions at 'PDK Kem Kabota' alone, going by Puan Nurhayaty's evidence she and her husband would have
I travelled approximately 10,320km. Counsel for the plaintiff sets out the calculation of the same below:

July 2017 (ie when Child M was 2 years of age) to February 2021 = 43 months

2 therapy sessions a week = 8 visits a week

15 km x 8 trips a month x 2 (from the home to 'PDK Kem Kabota' and back) x 43 months = 10,320km

[44] For therapy sessions at the hospital, Puan Nurhayaty and her husband would have had travelled approximately 2,440km, which is an average of 470km a year. Counsel sets out the calculation of the same below:

January 2016 (ie when Child M first began undergoing therapies at the Hospital) to February 2021 = 61 months

20 km x 2 trips a month (from the home to the Hospital and back) x 61 months = 2,440 km

[45] This calculation does not take into account Puan Nurhayaty's unchallenged evidence that her husband would often go first to get a waiting number and she would come later. Hence, the amount of travelling would be twice the figure above.

[46] The plaintiff submitted that even those two figures, 10,320 km and 2,440 km, do not represent the whole of the travelling which Puan Nurhayaty and her husband had to undertake for Child M. They have had to travel far more in order to ensure that Child M's special and often urgent needs were taken care of. The plaintiff submits that the pleaded sum of approximately RM1,000 per month is therefore reasonable if not on the low side. See: *Kasirin bin Kasmani v The Official Administration & Anor* [1991] MLJU 22; [1991] 2 CLJ Rep 800.

[47] The defendant contends that RM2,000 is a reasonable amount because the treatment Child M received from Hospital Tawau is free. The other travelling expenses should not be considered because the plaintiff and PW2 themselves chose to take Child M to private clinics.

[48] The reason given by the PW2 for taking Child M to private clinics for medical attention was unchallenged. Further, the first defendant elected not to call evidence. It is trite law that, when a defendant chooses not to tender evidence, all evidence led by the plaintiff must be assumed to be true. An adverse inference would also be drawn against a defendant for his failure to lead evidence.

[49] In *Jaafar Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693, which has been misdescribed by the editors as a Supreme Court case, the Federal Court had said as follows:

Gopal Sri Ram JCA (as His Lordship then was) at p 712:

A ... Once he had done this, it was incumbent for the learned sessions judge to have put counsel to his election, namely, that if he did not call evidence, he would stand or fall on his submissions. The rule of procedure, which requires these steps to be followed, is not a mere formality but one of essential justice. For, *once a defendant in civil proceedings elects not to call evidence, then all the evidence led by the plaintiff must* B *be assumed to be true.*

In this context, it is sufficient to refer to the following passage in the judgment of Elphinstone CJ Wasakah Singh v Bachan Singh [1931] 1 MC 125 *at p 128:*

> If the party on whom the burden of proof lies gives or call evidence which, if it C is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence, At this stage, the truth or falsity of the evidence is immaterial. For the purpose of resting whether there is a case to answer, all the evidence given must be presumed to be true ....

D Peh Swee Chin FCJ (as His Lordship actually had become, from SCJ) at p 705:

> ... The defendants had however chosen to close the case at the end of the plaintiffs' case; they were entitled to do so though they would be in peril of not having the evidence of their most important witness and of having any adverse inference drawn E against them for failing to call any such evidence should the circumstances appropriately call for such an adverse inference or for the presumption of avoiding unfavourable evidence by the defence to be invoked against the defendants.

[50] Wan Ahmad Farid JC (as His Lordship then was) had said as follows at F p 6 of his unreported judgment in *Nasruddin*:

> ... Learned counsel for the first defendant, on the other hand, submitted that no adverse inference should be drawn against the defendants for failing to adduce evidence on this matter. Encik T Tharumarajah sought to distinguish the aforesaid case by arguing that the case concerns the issue of liability, whereas the issue before G the Court in the instant case is that of quantum of damages. With respect, there is nothing in the judgments of Peh Swee Chin SCJ and Gopal Sri Ram JCA (later FCJ) to indicate that, in applying the aforesaid proposition of law, a distinction must be made between a trial that concerns the determination of liability and that of assessment of damages ...

H

See also: *Yap Sao Leong* above.

[51] The claim for travel expenses is supported by oral and documentary evidence and covers travel expenses from July, 2015 until February, 2021 for a I total of 67 months at the rate of RM1,000 per month. However, it is unclear from the evidence whether the Toyota Innova was mainly used to transport Child M to the hospital or clinic or was it also used to transport the plaintiff's family members. It is also unclear who owns the Toyota Innova. Having regard to the lack of receipts and documentary evidence to fully support the pleaded

sum of RM67,000, this court finds that from the oral and documentary evidence, a sum of RM33,500 is reasonable and justifiable in the circumstances. See *Dato' Stanley Issacs* and *Rohgetana Mayathevan* above. Further, there is no evidence from the first defendant to prove otherwise. Hence, a sum of RM33,500 is awarded for travel expenses.

Special food supplements

[52] The plaintiff had pleaded the sum of RM37,814.80 under this head of damages. See: item 11.22 at p 8 of the amended statement of claim (bundle of pleadings) (encl 54).

[53] Some of the bills and receipts for such expenses may be found at pp 756, 759 and 772 of the plaintiff's bundle of documents (Vol 2) (encl 58 — PBD 1).

[54] Puan Nurhayaty (PW 2) was not challenged at all regarding this item of special damages. Her evidence therefore ought to be accepted as true by this Court. See: *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 (CA). In the circumstances, the pleaded sum of RM37,814.80 is allowed.

Stimulus massage therapy

[55] The plaintiff had pleaded the sum of RM10,000 under this head of damages. See: item 11.24 at p 8 of the amended statement of claim (bundle of pleadings) (encl 54).

[56] Some of the bills and receipts for such expenses may be found at pp 760 to 769 of the plaintiff's bundle of documents (Vol 2) (encl 58 — PBD 1). Puan Nurhayaty had explained that she did not keep all of the receipts.

[57] It was put to Puan Nurhayaty by learned senior federal counsel that therapy sessions are available for free at Government hospitals. See: p 1599 of the notes of proceedings.

[58] The plaintiff submits that the test of whether such damages should be awarded is not whether such treatment could be obtained for free at public hospitals but whether it was reasonable for the plaintiff to have sought private treatment. In *Chai Yee Chong v Lew Thai* [2004] 2 MLJ 465, the Court of Appeal allowed the full medical expenses incurred at the private hospital (although the said treatment was available for free at a public hospital) because it was reasonable in the circumstances for the plaintiff to have sought treatment at the said private hospital.

[59] In that case it was shown that the claimant would have experienced some delay in a public hospital to receive surgical treatment and therefore it was reasonable for him to have sought faster treatment at a private hospital. The relevant parts of the judgment is reproduced below:

> [66] In the instant appeal, even though the learned judge in his grounds of judgment did not refer to the facts leading to the transfer of the respondent from the Ipoh General Hospital to Fatima Hospital but appears to have imported his personal knowledge regarding the expenses charged by Fatima Hospital, there is ample evidence to show that the respondent was justified in obtaining medical treatment at the Fatima Hospital. The respondent was hospitalised for 73 days at the Ipoh General Hospital where he underwent one major operation to his hand. No operation was done to the plaintiff's leg at the Ipoh General Hospital from the date of admission on 15 October 1982 until the date of his discharge on 26 December 1982. Indeed, only after he was discharged from the Ipoh General Hospital that he on 30 December 1982 (four days after the discharge) was admitted to Fatimah Hospital. There muscle flap and skin graft operation was done to his right leg and he was discharged on 10 February 1983. He was again readmitted to Fatimah Hospital on 25 April 1983 and underwent a vascularized pedicle fibular graft and bone graft operation to bridge the bone gap in the right tibia. He was discharged on 23 July 1983. On 17 December 1984, he was again readmitted at the Fatimah Hospital on 17 December 1984. A third operation was done to remove screws, dead bone and necrotic tissue from the right leg. Garamycin beads were inserted along the infected right tibia. He was discharged on 4 February 1985. Altogether, he was hospitalised at Fatimah Hospital for 183 days.
>
> [67] During his stay at the Ipoh General Hospital of 73 days, no operation was done to his leg. Instead, he was discharged to follow up weekly at the clinic only for wound inspection.
>
> [68] So, there is ample evidence that he was justified in seeking further treatment at the Fatimah Hospital after his discharge from the General Hospital ....
>
> ...
>
> [106] The best and safest guide that I can give is always to bear in mind the basic principle that a plaintiff if entitled to recover all expenses reasonably incurred for medical treatment as a result of his injuries, as he is entitled to recover all other expenses so incurred. So if it is reasonable that a plaintiff seeks or receives treatment, whether from the outsde or midway, at a private hospital instead of a government hospital, or at a particular private hospital instead of at some other private hospital, or at a private hospital abroad instead of locally, then he is entitled to recover the expenses incurred for medical treatment at the private hospital. Whether it is reasonable that he seeks or receives medical treatment at the private hospital must depend on the facts and circumstances of the case. Therefore in those cases where the courts decided that treatment in the particular private hospital was reasonable, the decision was correct in principle. What error there might have been was in the judge's assessment of the facts and circumstances, the facts and circumstances being insufficient or being not such as to warrant a finding of reasonableness. But it is not for us to pass judgment on the finding of reasonableness in these decisions because they are not on appeal before us and it was not necessary for us to do so to decide this appeal. Neither, I think, would it be wise, as my learned brother has attempted to

> do, to lay down a guide as to the circumstances in which it would be reasonable for a plaintiff to seek or receive treatment at a private hospital. One simply cannot forsee the likely ramification of circumstances. The law as to what is reasonable must be allowed to develop as cases are decided in the light of their own particular and peculiar circumstances. Incidentally, I should explain that the reasons why I have been speaking of a plaintiff seeking or receiving treatment, and not just seeking treatment, is because I am conscious of the possible existence of cases where it was not the plaintiff or his relatives that chose treatment at a private hospital, but the plaintiff happened to be bought there after an accident by disinterested persons when he was not in a state to make any decision, and was admitted and given treatment there ...

[60] The test of 'reasonableness' set out in *Chai Yee Chong* was later reaffirmed by the Federal Court in *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1, Justice Hamid Embong FCJ had said as follows as regards the same:

> [36] In this respect, we are in agreement with the contention of the appellant that the case of *Chai Yee Chong* is not relevant to the present case. We respectfully say that the Court of Appeal had erred in coming to its conclusion that the award made by the learned trial judge was in line with the current practice on the strength of the decision in *Chai Yee Chong*, which is a case concerning a claim for past private medical treatment. In determining a claim for future medical treatment, be it at a private, or at a public hospital, the question of reasonableness in making such a claim should always be the paramount consideration. The plaintiff not only needs to justify, for instance, why he chooses treatment at a private hospital over a public one, but he must also show that the amount claimed for such treatment is reasonable. Of course this can be satisfied by the production of compelling evidence for that purpose. It is to be noted that in claiming for the cost of future damage in Gleneagles, evidence was led as to the cost of rehabilitation care of the first respondent and the costing was obtained from the private hospitals/centres.

[61] In this case, Puan Nurhayaty had explained that she and her husband had sought private therapy for Child M because the physiotherapy appointments at the hospital were only once a month; that there were many other patients seeking such therapy as well; that the waiting time was too long resulting in Child M becoming irritable; and that she and her husband therefore took the initiative of having Child M undergo stimulus massage therapy at a private centre. See: pp 1604–1616 of the notes of proceedings.

[62] From the undisputed evidence of PW2, it was reasonable of the plaintiff to have sought private treatment, going by the circumstances at the material time. Thus, the pleaded sum of RM10,000 for cost of stimulus massage theraphy is therefore allowed.

Support equipment

[63] The plaintiff had pleaded the sum of RM8,050 under this head of damages for the cost of purchasing the following appliances, equipment and machines:.

(a) a corner chair;

(b) a suction machine;

(c) a shower chair;

(d) positioning wedges;

(e) a stroller; and

(f) a standing frame.

See: item 11.25 at p 8 of the bundle of pleadings (encl 54).

[64] The bills and receipts for such expenses may be found at pp 726–778 and 774 of the plaintiff's bundle of documents (Vol 2) (encl 58 — PBD 1).

See also: Q&A 104 and 116 at pp 1276 and 1283 of the witness statement of Puan Nurhayaty bt Mohd Jufri.

Page 45 of the notes of proceedings.

[65] Puan Nurhayaty was not challenged at all regarding this item of special damages.

[66] Learned senior federal counsel has submitted as follows at para 61:

> 61. In applying to our case, we can see that the plaintiff bought a Stroller Snappi which cost (sic) RM4,560 which was an expensive stroller. The plaintiff could have got (sic) a much more cheaper brand of stroller with the same function. Same goes to standing frame lackey in which the plaintiff claimed that they had bought for RM3,898. The defendant found that are much cheaper child standing frame (sic) with seat & quick release table that cost just RM1,499.

[67] The defendant not only called no witnesses, it also did not challenge Puan Nurhayaty at all in cross-examination regarding the support equipment purchased for Child M.

[68] The plaintiff submits that if it felt that the plaintiff was being 'extravagant' or 'excessive' in purchasing such items, the first defendant should have tendered evidence of the supposedly cheaper options which it had found and also put such suggestion to the plaintiff's witnesses.

[69] In an adversarial dispute like in this case there is a duty to put one's case to the adversary and his or her witnesses. A failure to put is often enough fatal as explained in a string of cases starting from the decision of the House of Lords in *Browne v Dunn* [1894] 6 R 67.

See also: *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors* [1995] 2 MLJ 770 and *Sivalingam a/l Periasamy* above.

[70] The claim for support equipment is supported by documentary and oral evidence which are undisputed. In the circumstances, the pleaded sum of RM8,050 is allowed.

Obtaining pre-action discovery of medical records

[71] The plaintiff had pleaded the sum of RM7,000 under this head of damages. The invoice for the same is found at p 849 of the plaintiff's bundle of documents (No 2) (encl 67 — PBD 2). See: item 11.26 at p 8 of the amended statement of claim (bundle of pleadings) (encl 54).

[72] Puan Nurhayaty was not challenged at all regarding this item of special damages. See: *Sivalingam a/l Periasamy* above.

[73] It is not in dispute that the defendant had refused to make voluntary disclosure of copies of Puan Nurhayaty's and Child M's medical records. Hence, an application to the court was required. The cause papers in regard to such application are found at p 803–827 of the plaintiff's bundle of documents (Vol 2) (encl 58 — PBD 1). The matter of pre-action discovery had been litigated in the courts for almost a year before the Government finally agreed to make disclosure.

[74] It is trite law that a successful litigant is entitled to recover as damages the costs of his or her pre-action discovery proceedings.

See: *Norwich Pharmacal Co and others v Commissioners of Customs and Excise* [1972] 3 All ER 813. The sealed judgment dated 31 May 2017 in *Devarani a/p Vijiyan v Dr Daniel Foo Yong Chiang dan satu lagi* [2017] MLJU 2444 in the Kuala Lumpur High Court Civil Suit No 22NCVC–116–03 of 2015 *Vincent Manickam s/o David and Ors v Dr S Hari Rajah & Anor* [2018] 2 MLJ 497.

[75] In *Morton-Norwich Products Inc v Intercen Ltd (No 2)* [1981] FSR 337, the court at p 348 allowed the costs of the pre-action discovery proceedings as damages in a subsequent action and held as follows:

A ... The steps they took in bringing the discovery action, say the plaintiffs, were reasonable and justified in the circumstances and they ought now to be able to recover expenses incurred in bringing such proceedings as an element in their damages suffered in the present action.

B **[76]** The Court of Appeal in *Tan Jamie v Hasnah Salim & Ors* (Court of Appeal Civil Appeal No TA-21NCVC-19–11 of 2014) had reversed the trial judge's decision not to award the solicitor and client costs incurred by the plaintiff in obtaining pre-action discovery of medical records.

C **[77]** In *Sugunah d/o Sinnappa vs Dr Abdul Gafoor bin Abdul Mubarak and 8 Ors* (Alor Setar Civil Suit No 21NCVC-25–10 of 2015) (unreported), the High Court reversed the decision of a Deputy Registrar not to award the solicitor and client costs incurred by the plaintiff in obtaining an order for pre-action discovery of the medical records.
D

[78] In *Nur Syarafina bt Sa'ari v Kerajaan Malaysia & Ors* [2019] 12 MLJ 741; [2019] 9 CLJ 246, a medical negligence case against the Government, the court had held that the sum of RM10,000 was a reasonable estimate of the
E solicitor-client costs for an application for pre-action discovery of medical records and allowed the claimant to claim that amount as special damages notwithstanding that a formal bill had yet to be issued by the claimant's solicitors.

F **[79]** The plaintiff's medico-legal advisers and experts would not have been able to give advice or opinions on the merits of this action without first having to study copies of the medical records. Obtaining access to the records is a necessary step to take before bringing a claim in medical negligence.

G **[80]** Although the plaintiff has yet to pay the proforma bill, the solicitor and client costs for the legal services rendered has been incurred and he would be liable to pay the legal fees for the application in the future.

H **[81]** In the circumstances and applying the aforesaid authorities to the instant case, the pleaded sum of RM7,000 for pre-action discovery to obtain Child M's medical records is allowed.

Value of care provided to Child M by his family members and others

I **[82]** The plaintiff had pleaded the sum of RM134,000 (calculated at the rate of RM2,000 a month from July 2015 until February 2021 for a total of 67 months) under this head of damages.

See: item 11.27 at p 9 of the amended statement of claim (bundle of pleadings) (encl 54).

[83] The courts have long recognised the value of care given to the victim of a tort by his or her family members. An award for the value of care is made for such gratituous care.

See: *Tan Cheong Poh & Anor v Teoh Ah Keow* [1995] 3 MLJ 89.

[84] In *Pyu Pyu Ma v Dr Lim Soo How & Ors* [2019] 11 MLJ 628, the claimant, who was a refugee from Myanmar, had suffered negligent treatment and required care from her mother and husband while she recovered from her injuries. Firuz Jaffril J, in awarding damages for the value of care, had stated as follows:

> [59] In respect of the plaintiff's claim for value of care, such a claim has on numerous occasions been allowed by our local courts (see *Mayathevan*'s case). In the present case, the plaintiff is claiming for the value of care she received from her mother and husband during the time she was recovering from her injuries. Without the assistance of her mother and husband, it would not be possible for the plaintiff to take care of her baby as well as herself. In this regard, I am of the view that the value of care for eight months is reasonable.

[85] During Child M's five years and seven months of life, his main carers were the plaintiff and his wife Puan Nurhayaty. They had also engaged the maid Asnidar and later the caregiver Joharia to assist them with caring for Child M and also on occasion received the assistance of their family members.

See: Q&A 38 and 40 at pp 800 and 836 of the witness statement of Puan Nurhayaty bt Mohd Jufri.

[86] Both the plaintiff and his wife Puan Nurhayaty were at the material time in full-time employment, the former a lecturer at Kolej Komuniti Tawau and the latter a teacher at SMK Balung Tawau. They also had two young children at the time of Child M's birth, Aishah and Furqan. Their fourth child Imran came later, a year after Child M's birth. See: Q&A 3, 6 and 7 at pp 600, 609 & 612 of the witness statement of Puan Nurhayaty bt Mohd Jufri.

[87] Puan Nurhayaty had in her witness statement explained in detail the care she and the plaintiff provided to Child M and the many difficulties faced while caring for him. Counsel sets out a summary of her evidence in this regard:

(a) that following Child M's discharge from the hospital they struggled with caring for Child M who frequently had difficulty sleeping;

(b) that Child M had to be fed milk and medications through his Ryles tube every few hours;

(c) that the plaintiff would often 'pergi kerja dalam keadaan yang mengantuk' while Puan Nurhayaty was herself still recovering from the traumatic labour;

(d) that Child M's Ryles tube often 'tercabut' requiring them to rush to the hospital to obtain a replacement tube out of fear that Child M might not be fed;

(e) that Child M often suffered from phlegm and not only required regular suctioning but also required nebulisers which the parents often had to go out to purchase;

(f) that sometimes they had to take all of their children out when travelling to the hospitals or clinics because their maid at the time did not work at night;

(g) that they had to bring Child M for his numerous medical and therapy appointments;

(h) that they often took leave to bring Child M to his appointments;

(i) that Puan Nurhayaty had once almost gotten into a car accident because she was rushing to get to work after bringing Child M to his appointment at the hospital;

(j) that both their annual leave days are used not for them but used when Child M is required to seek urgent treatment;

(k) that Puan Nurhayaty would reject opportunities to undergo courses for her work but which are outstation as she was afraid of not being able to return to Child M quickly enough should an emergency arise; and

(l) that because Child M is not able to express himself, they pay much more attention to him than to their other children which in turn has adverse effects on the well-being of their other children.

See: Q&A 38, 94 and 97 at pp 8, 20 & 21 of the witness statement of Puan Nurhayaty bt Mohd Jufri.

[88] Puan Nurhayaty had also given evidence that they had engaged the maid Asnidar prior to Child M's birth; that they paid approximately RM750–RM900 a month to the maid Asnidar which they later increased by RM400–RM550 following Child M's birth. They later engaged the caregiver Joharia when Asnidar left their employment to get married and paid her approximately RM400 a month to care for Child M.

See: Q&A 44 at pp 10 of the witness statement of Puan Nurhayaty bt Mohd Jufri p 1470 of the notes of proceedings.

[89] Learned senior federal counsel has stated as follows at paras 70 and 74 of

the defendant' submission:

> 70. ... there are many inconsistencies from PW2 regarding the payment of Asnidar. This could have been some kind of strategy raised by the plaintiff and PW2 to get more damages from this suit ...
>
> ...
>
> 74. From all the questions and answers above, it can be seen that there are many inconsistencies in the statement of PW2 plus there are no valid proof that Asnida really exist and just a made up person by the plantiff. The only reasonable conclusion we can reach is the motive of the plaintiff and PW2 prepared all the payment voucher is to get more compensation from the defendant.

[90] The plaintiff submits that the learned senior federal counsel has blatantly accused the plaintiff and his wife of deceiving the court; lying to the court; and forging documents before the court all for the purpose of claiming more in damages. The plaintiff contends that such accusations are unwarranted; deeply offensive; and are mere afterthoughts following trial.

[91] The plaintiff contends that there is no great mystery regarding the maid Asnidar. Child M's parents had hired Asnidar prior to his birth but increased her wages later to match the increased workload as a result of caring for Child M. Asnidar was paid in cash for her tenure with Child M's family, following which she was issued salary vouchers so that the parents may document such expenses. Asnidar did not know how to write, hence the thumbprints on the vouchers. Such vouchers were then tendered as evidence before the court.

[92] The defendant through its counsel had agreed to mark them as Part B documents but has now, in submission, appear to be challenging the authenticity of such vouchers.

[93] The parents are not claiming for the cost of hiring a maid. They are asking the court to take such fact into consideration when awarding damages for value of care provided to Child M.

[94] The claim for cost/value of care has been proven by oral and documentary evidence. There is no evidence from the first defendant to prove otherwise. From the oral and documentary evidence, the additional sum paid to the maid, Asnidar to look after Child M was between RM400–RM550 per month and after she left the plaintiff's employment, a new caregiver, Joharia was engaged to take care of Child M. Joharia was paid approximately RM400 a month. Prior to Child M's birth, the amount paid to Asnidar as maid to serve the plaintiff's entire family household was approximately RM750–RM900 per month. Therefore, the sum of RM2,000 per month claimed by the plaintiff for value of care given to Child M alone is on the high side. A sum of RM500 per

month would be fair and reasonable. See *Muhammad Zulkarnain bin Mohamed Rokani (a child suing through his representative, Mohamed Rokani bin Mokmin) & Ors v Pengarah Hospital Sultan Ismail Johor Bahru & Ors* [2021] 8 MLJ 762 (HC). In the circumstances, this court awards a sum of RM33,500 (RM500 x 67 months) for the cost/value of care given to Child M by his family members and other caregivers.

Purchasing a new home and renovations to accommodate Child M's needs

[95] The plaintiff had pleaded the sum of RM448,400 under this head of damages. See: item 11.29 at p 9 of the amended statement of claim (bundle of pleadings) (encl 54).

[96] Puan Nurhayaty had given evidence that it had cost approximately RM330,000 to purchase the new home. She had also said that a further RM150,000 was spent to renovate the home but the sum of only RM49,245 of that was used to renovate Child M's room, therapy space and bathroom.

See: Q&A 78 and 92 at pp 16 and 19 of the witness statement of Puan Nurhayaty bt Mohd Jufri p 1721 of the notes of proceedings.

[97] A copy of the sale and purchase agreement of the new house is found at pp 899 to 910 of the plaintiff's bundle of documents (No 2) (encl 67 — PBD 2). The invoices in respect of the renovations to the new house are found at pp 724–725 of the plaintiff's bundle of documents (Vol 2) (encl 58 — PBD 1). Photographs of the new home were also tendered as evidence (see pp 894 to 898 of the plaintiff's bundle of documents (No 2) (encl 67 — PBD 2).

[98] Puan Nurhayaty was not challenged on the cost of purchasing the new home. She was challenged only on the cost of renovating the new home. See: *Sivalingam a/l Periasamy* above.

[99] Puan Nurhayaty had given the following unchallenged evidence regarding the reason for purchasing a new home:

(a) that between 2010 and 2018 they had lived in a single-storey terrace house in Bandar Sri Indah, Tawau and which was located in the middle of a row of houses;

(b) that the old house was unsuitable for a number of reasons, namely that;

(i) it was often too dark requiring the lights to be turned on even during the day;

(ii) the ventilation was 'kurang baik sebab tidak ada tingkap kiri kanan' causing Child M to sometimes have difficulty breathing;

(iii) that there were only three bedrooms (two on the upper floor, one on the lower floor) which were not sufficient, taking into account Child M, his two parents, their three other children and the maid (one of the rooms had to be converted into a store room for Child M's appliances and equipment and so Child M shared a room with his parents and siblings);

(iv) that there was limited space in the house, bringing difficulty in the daily care of Child M;

(v) that it was difficult to retrieve Child M's items from the store room; and

(vi) that in view of such difficulties and also with a view to improving the quality of Child M's long termcare, they had purchased their current home which is also located in in Bandar Sri Indah, Tawau and renovated it as well to make it suitable for Child M.

See: Q&A 81 and 84 at pp 17 & 18 of the witness statement of Puan Nurhayaty bt Mohd Jufri.

[100] It was suggested by learned senior federal counsel that Puan Nurhayaty and the plaintiff had planned to buy a new house 'regardless of Child M's health condition'. Puan Nurhayaty disagreed with such suggestion.

See: p 1773 of the notes of proceedings.

[101] It was also suggested by learned senior federal counsel that, going by some of the photographs of the living spaces in the new home prior to renovation, the house was spacious enough and suitable for Child M's comfort. Puan Nurhayaty disagreed and explained that the renovation had been done with Child M's condition in mind and that the new house before renovation was actually smaller than the old house. See: p 1700, 1749 and 1763 of the notes of proceedings.

[102] In *Harraz* above, the High Court had awarded the sum of RM400,000 as the cost of building suitable accommodation for the brain damaged Harraz on the land owned by Harraz's parents. The award of damages was later affirmed by the Court of Appeal.

[103] In *Nur Syasya Syaurah bt Tahir v the Government of Malaysia & Anor* [2018] MLJU 2143, the High Court in a brain damaged infant had awarded the sum of RM157,960 as damages for the cost of house renovations. The court in awarding such damages had taken into account the fact that the defendant did not 'commission any contractor of their own to debunk PW1's quotation and the reasonableness of such renovations', much like in this case.

[104] In *Rokiah Sabeh v Dr Ch'ng Beng Keat & Anor* Seremban (Summons No 22NCVC-72 of 2011) (unreported), the High Court had awarded the sum of RM88,894 as the cost of constructing a new disabled-friendly home.

[105] In the circumstances, it is submitted by the plaintiff that that it was reasonable for the plaintiff and his wife to have purchased the new home taking into account Child M's needs. The defendants had led no evidence to suggest otherwise.

[106] The learned SFC submits that it is unfair for the defendant if this court awarded the plaintiff with all that they are claiming for because firstly, the plaintiff have the qualification and capabilities to buy a new house since both of them (plaintiff and PW2) are government servant. So, it would not be hard for them to get approval to buy a new house.

[107] The learned SFC further submitted that the whole renovation is irrelevant because why would the plaintiff renovate his whole house up to RM150,000 if he does not have the financial means to do so. If the plaintiff truly wanted to renovate for Child M only, he would only claim for the renovation they have done for Child M only but now they are claiming for the price of the house amounting to RM330,000 and whole renovation of the house amounting to RM150,000. It means that the renovation was not for Child M only but for the whole family as mentioned by PW2 in her own witness statement.

Line 1153–1154:

S: Mengapa telah anda membuat pengubahsuaian tersebut?

J: Untuk keselesaan Child M dan anak-anak yang lain.

[108] Then, PW2 herself also admitted that they are only claiming for RM49,000 in which is the renovation cost for Child M's room only. There is also a receipt containing only the renovation cost for Child M's room only at:

Line 1730–1376:

S: Ini bermaksud tuntutan kamu sepatutnya hanyalah RM49,000 dan bukannya RM150,000, setuju? [This means that your claim is only for RM49,000 and not RM150,000, agree?]

J: Ya, memang kami hanya membuat tuntutan untuk ruang Child M sahaja. [Yes, we only made a claim for Child M's therapy space only].

[109] Thus, the defendant disagree with the amount claimed by the plaintiff and the claim for renovation for the whole house should be rejected by this court and the defendant only agree on the renovation of Child M's room amounting to RM49,000 which is to accommodate Child M comfort.

[110] There is a lack of cogent evidence to show that the old house was inadequate and Child M needs a bigger house or space to cater for or improve his health condition and needs. There is no medical evidence to show that Child M needs a bigger room or space due to his health condition. Further, there is no evidence to show that the old house could not be renovated and the plaintiff must buy a new house and incur further costs of renovating the new house. Thus, the evidence and circumstances of the case shows that it is unnecessary or unreasonable for the plaintiff to buy a new house costing RM330,000 and spend a further sum of RM150,000 for house renovation on account of Child M health condition and needs. The new renovated house is or would be used by the plaintiff's family. As the new house would appreciate in value over time, there is no evidence of loss to the plaintiff for buying the new house. In the circumstances, the purchase price for the new house in the sum of RM330,000 is disallowed and the sum of RM49,250 that was used to renovate Child M's room is allowed.

Obtaining grant of letters of administration

[111] The plaintiff had pleaded the sum of RM17,090.74 under this head of damages. The invoice for the same may be found at pp 784–785 of the plaintiff's bundle of documents (Vol 2) (encl 58 — PBD 1).

See: item 11.32 at p 9 of the amended statement of claim (bundle of pleadings) (encl 54). Puan Nurhayaty was not challenged at all regarding this item of special damages.

[112] The learned SFC argued that the plaintiff should know that hiring a lawyer will incur expenses which means that the plaintiff should be prepared to pay all the fees for the documents needed for their suit.

[113] This court is inclined to agree with the plaintiff's submission that obtaining the grant of letters of administration was a necessary expense in order to ensure that the plaintiff had the locus standi to file this claim and later to administer the monies from the damages to be awarded in this case.

[114] In *Dato' Stanley Isaacs v The Government of Malaysia & Ors* [2019] 8 MLJ 331, the High Court held:

> (viii) Cost of obtaining letters of administration
>
> [53] According to PW1, the solicitors have not billed him for this amount because they are in the process of obtaining a distribution order from the courts.
>
> [54] *The learned SFC submitted that no award should be made since the amount is a mere estimate and not supported by any documents.*
>
> [55] *It is my considered opinion that RM5,000 claimed is a fair estimate of the*

solicitor-client costs to obtain the letters of administration and thus an award for such amount is made.

[115] In the circumstances, the pleaded sum of RM17,090.74 appears to be excessive for obtaining letters of administration for an infant. In my considered opinion, an amount of RM5,000 would be fair and reasonable. Thus, a sum of RM5,000 is awarded to the plaintiff for obtaining the grant of letters of administration.

COSTS

[116] The plaintiff attached a bill of costs in Form 117 of the ROC 2012 claiming the sum of RM300,000 for getting up fee for the liability and quantum proceedings and RM11,064 for out of pocket expenses.

[117] It is undisputed that liability was admitted albeit on the first day of trial and the trial proceeded for two days for assessment of the quantum of damages. There is no complexity or novelty on the law and facts concerning the assessment of the quantum of damages in this case. In the premises, this court finds that a global sum of RM70,000 for costs is fair and reasonable. See *Ahmad Radhiq Arbee* above. Thus, the costs awarded to the plaintiff for this case is RM70,000.

INTEREST

[118] The learned counsel for the plaintiff submitted that the general approved and accepted rates for pre-judgment interest have been as follows for many years:

(a) at the rate of 4%pa on special damages from the date of the incident to the date of judgment; and

(b) at the rate of 8%pa on general damages from the date of service of the writ to the date of judgment.

See: *Lau Kung Kai v Abu Serah bin Bol (M)* [2008] MLJU 352; [2008] 10 CLJ 245.

[119] It is trite law that aggravated damages are part of general damages. Aggravated damages should therefore attract the same rate of interest. See: *Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan* [2001] 6 MLJ 497.

[120] The learned SFC submitted that the defendant requests that this court look at the duties placed on the shoulders of the doctor on duty at the Government hospital. The Government hospital treats all patients who come to the hospital and does not have the option of turning away patients.

[121] The money used to pay for these costs are also citizens' money, therefore the defendant requests that the court use its discretion not to award interest on the judgment amount.

[122] Having regard to the facts and circumstances of this case and guided by the aforesaid authorities, this court is minded to exercise its discretion to award pre judgment and post judgment interest and in accordance with s 11 of the Civil Law Act and O 42 r 12 of the ROC 2012 and the Practice Direction No 1 of 2012 issued by the Chief Justice.

CONCLUSION

[123] Based on the aforesaid reasons, this court finds that the plaintiff has proven its claim for general and special damages on a balance of probabilities. The total damages assessed and awarded to the plaintiff is the sum of RM775,375.50 together with costs in the sum of RM70,000 to be paid by the first defendant to the plaintiff. In summary, the damages awarded to the plaintiff are as follows:

(a) general damages:

(i) pain, suffering and loss of amenities — RM250,000;

(ii) statutory bereavement — RM30,000 (agreed); and

(iii) aggravated damages — RM300,000.

(b) special damages:

(i) hospital and medical expenses — RM1,147 (agreed);

(ii) cost of purchasing diapers, wipes, creams, suction tubes and personal care items — RM9,118.70 (agreed);

(iii) funeral expenses — RM1,000 (agreed);

(iv) travel expenses — RM33,500;

(v) special food supplements — RM37,814.80;

(vi) stimulus massage therapy — RM10,000;

(vii) support equipment — RM8,050;

(viii) obtaining pre-action discovery of medical records — RM7,000;

(ix) value/cost of care to look after Child M — RM33,500;

(x) renovation to home to suit Child M's needs — RM49,245; and

(xi) obtaining grant of letters of administration — RM5,000

A (c)(i) interest on (a) (general damages) at the rate of 5%pa from the date of service of the writ (27 December 2019) until the date of judgment on liability on 20 June 2022;

(ii) interest on (b) (special damages) at the rate of 4%pa from the date of the incident (24 July 2015) up to the date of judgment on liability on 20 June 2022; and

B

(iii) interest on the judgment sum including costs at the rate of 5%pa from the date of judgment on liability (20 June 2022) until the date of full and final settlement.

C

Order accordingly

Reported by Nabilah Syahida Abdullah Salleh

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